No. 76-1113

In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
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JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA MCRAE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

IRVING JAFFE,
Acting Assistant Attorney General,

MORTON HOLLANDER,
ELOISE E. DAVIES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The district court's order of October 22, 1976 (App. A, *infra*) is reported at 421 F. Supp. 533. The order of October 29, 1976 (App. B, *infra*) is unreported.

JURISDICTION

The order of the district court, holding unconstitutional and enjoining enforcement of Section 209

of Pub. L. 94-439, was entered on October 22, 1976 (App. A, *infra*). Notice of appeal was filed on November 19, 1976 (App. C, *infra*). On January 11, 1977, Mr. Justice Marshall extended the time for docketing the appeal to and including February 17, 1977. This Court's jurisdiction is conferred by 28 U.S.C. 1252. See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32.

QUESTIONS PRESENTED

1. Whether Section 209 of Pub. L. 94-439, which prohibits the expenditure of federal funds for abortions under Medicaid except where the life of the mother would be endangered if the fetus were carried to full term, is constitutional.

2. Whether the plaintiffs had standing to raise this issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1, of the Constitution of the United States provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [or] the Laws of the United States * * * [and] to Controversies to which the United States shall be a Party * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 209 of the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. 94-439, 90 Stat. 1434, provides:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. (and Supp. V) 1396 *et seq.*, establishes a medical assistance program, commonly known as "medicaid," pursuant to which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment provided to needy individuals. For a state to qualify for federal assistance under Title XIX, its medicaid plan must reimburse expenses incurred by the "categorically needy"[1] with respect to five general categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facility services, periodic screening

[1] The "categorically needy" includes families with dependent children and the aged, blind, and disabled. 42 U.S.C. (Supp. V) 1396a(a)(10)(A). The states may also choose to extend medicaid coverage to other needy individuals, termed the "medically needy." 42 U.S.C. (Supp. V) 1396a(a)(10)(C).

and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. (Supp. V) 1396a(a)(13)(B) and 1396(a)(1)-(5).

Title XIX does not, however, require participating states to provide payment for every medical treatment falling within those five general categories. All the Act requires is that the state medicaid plan establish "reasonable standards * * * for determining * * * the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX]." 42 U.S.C. (Supp. V) 1396a (a)(17). The Act does not by its express terms require participating states to pay for the costs of abortions. But fifty of the fifty-three jurisdictions participating in Title XIX, including New York, have adopted medicaid plans that provide reimbursement for the costs at least of therapeutic abortions,[2] and the Secretary has regularly paid those states a specified percentage of the amounts they expend in covering such costs. On September 30, 1976, however, Congress enacted Pub. L. 94-439, the Depart-

[2] We use the term "therapeutic abortions" to refer to abortions determined by the attending physician to be "necessary for the preservation of the patient's health," as this Court has construed like phrases in *United States* v. *Vuitch*, 402 U.S. 62, and *Doe* v. *Bolton*, 410 U.S. 179. In *Vuitch*, the Court determined that " 'health' * * * includes psychological as well as physical well-being" (402 U.S. at 72). In *Bolton*, the Court observed (410 U.S. at 192): "Whether * * * 'an abortion is necessary' is a professional judgment that * * * may be exercised in the light of all factors—physical, emotional, psychological, familial, and the women's age—relevant to the well-being of the patient. All these factors may relate to health."

ments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Section 209 of which provides:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.[3]

2. The plaintiffs, who represent New York medicaid recipients, physicians who perform abortions in New York, and hospitals in New York at which abortions are performed,[4] brought these actions on Sep-

[3] Section 209 was sponsored by Representative Hyde of Illinois and is commonly known as the "Hyde Amendment."

[4] Plaintiffs in No. 76-C-1804 are Cora McRae, a New York resident and medicaid recipient who was in the first trimester of pregnancy and who had decided, in consultation with her physician, to terminate her pregnancy for reasons other than that her life would be endangered; Planned Parenthood, a non-profit New York corporation that provides family planning services and operates state-licensed clinics where abortions are performed for medicaid-eligible women; and Irwin B. Teran, a physician who performs abortions for medicaid-eligible women. Plaintiff McRae has sued on her own behalf and on behalf of "the entire class of pregnant or potentially pregnant women in the State of New York who are eligible for Medicaid, who with their physician have decided on abortions, for whom abortions are medically appropriate and who are prevented from obtaining medical termination of their pregnancies by the Hyde Amendment" (Complaint ¶ 8). ("Complaint" refers to the complaint in No. 76-C-1804.) Plaintiff Teran has sued on his behalf and on behalf of "the entire class of duly licensed physicians and surgeons certified for participation in Medicaid and presently performing or desiring to perform the termination of pregnancies of mem-

tember 30, 1976, in the United States District Court for the Eastern District of New York. They requested that the Secretary be enjoined from enforcing Section 209 as to payments made to the State of New York. The plaintiffs alleged that the statute, by preventing the Secretary from assisting the State with respect to costs associated with elective abortions[5] while permitting such assistance with respect to costs associated with childbirth, denies pregnant women eligible for medicaid funding in New York due process and equal protection of the laws, in violation of the Fifth Amendment, and deprives them of "their right to control their own persons, and to privacy and liberty in matters relating to marriage, sex, procreation and the family, all in violation of the Fourth, Fifth and Ninth Amendments to the Constitution" (Complaint ¶ 28). Plaintiffs also alleged that

bers of the * * * class of women" named in the complaint (*id.* at ¶ 12).

Plaintiff in No. 76-C-1805 is the New York Health and Hospitals Corporation, a public benefit corporation that operates 16 municipal hospitals, at 12 of which abortions are performed.

[5] We use the term "elective abortions" to refer to abortions not necessary to protect the life of the woman. As a general matter, "elective abortions" includes both nontherapeutic abortions (see note 2, *supra*) and those therapeutic abortions that relate only to the woman's psychological, not her physical, well-being. For example, depending upon the particular circumstances abortions performed "as a method of family planning, or for emotional or social convenience" (H.R. Rep. No. 94-1555, 94th Cong., 2d Sess. 3 (1976)), could be either therapeutic or nontherapeutic, but such abortions would always be elective.

Section 209 deprives physicians of "the right to practice medicine in accordance with their best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution" (*id.* at ¶ 37) and deprives plaintiff Planned Parenthood of the right to continue its program of medical services without due process of law (*id.* at ¶ 41). Finally, plaintiffs contended that the Amendment served no secular purpose and therefore constituted an establishment of religion, in violation of the First Amendment (*id.* at ¶ 45).[6]

3. After a hearing, the district court entered a preliminary injunction on October 22, 1976,[7] prohibiting the Secretary from enforcing Section 209 and requiring him to "[c]ontinue to authorize and expend federal matching funds for abortions provided to women eligible for Medicaid at the proportionate level and in accordance with the standards under which they were being paid before enactment of" that statute (App. A, *infra*, pp. 23a-24a).[8] In addi-

[6] On October 19, 1976, Senators James L. Buckley of New York and Jesse A. Helms of North Carolina, Representative Henry J. Hyde of Illinois, and Isabella M. Pernicone were permitted to intervene as parties defendant.

[7] A temporary restraining order had been entered on October 1, 1976, and extended to October 22, 1976.

[8] Pursuant to Rule 23(a), (b)(1), and (b)(2), Fed. R. Civ. P., the court also certified No. 76-C-1804 as a class action on behalf of the classes of pregnant or potentially pregnant medicaid-eligible women and duly-licensed and medicaid-certified providers of abortion services in the State of New York.

tion, the court ordered the Secretary immediately to issue the following notice to his Department's Regional Directors with instructions to disseminate the notice to all state and local medicaid authorities and providers within their region (App. A, *infra*, pp. 24a-25a):

> In conformity with the order of the United States District Court for the Eastern District of New York entered October 22, 1976, which enjoins enforcement of the Hyde Amendment, the Department of Health, Education and Welfare will provide reimbursement for all abortions provided to Medicaid-eligible women by certified Medicaid providers on the same basis as the Department pays reimbursement for pregnancy and childbirth-related services.

On October 29, 1976, the court denied the Secretary's motion to amend the preliminary injunction to provide that medicaid funds paid to the states as a result of this order would be subject to recoupment if the order were to be reversed on appeal (App. B, *infra*).[9] In doing so, the court observed that although its earlier order "did not explicitly hold that Section 209 was unconstitutional * * * [s]o much * * * is implicit in the granting of the injunction * * *" (App. B, *infra*, p. 29a).[10]

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[9] The district court denied a motion to stay its order pending appeal.

[10] On November 3, 1976, the Secretary issued the notice in accordance with the order of the district court. On November 8, 1976, this Court denied the intervenors' application for a stay of that order. The intervenors have filed a separate appeal. *Buckley* v. *McRae*, No. 76-694.

THE QUESTIONS ARE SUBSTANTIAL

The question whether the federal government has a constitutional obligation to provide financial assistance with respect to abortions is one of obviously substantial social, political, and fiscal importance. But the decisions of this Court make plain that the plaintiffs lack standing to bring this question before the federal courts.

1. In undertaking to adjudicate the dispute in this case, the district court proceeded upon a misapprehension of the nature of the federal role in the furnishing of medicaid assistance to the needy and, consequently, upon a misunderstanding of the effect of the statute challenged here. Enforcement of Section 209 will not inflict any legal injury upon the plaintiffs or impair any of their legal rights. They therefore lack standing, even in the minimal constitutional sense, to bring this suit.

The federal government does not provide assistance directly to medicaid beneficiaries. Instead, federal payments are made to the states "[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish * * * medical assistance on behalf of [certain needy] families * * *." 42 U.S.C. (Supp. V) 1396. A state is entitled to federal payments only if it establishes a satisfactory plan for medical assistance pursuant to 42 U.S.C. (and Supp. V) 1396a. Under this arrangement, reimbursement of the medical expenses of medicaid beneficiaries is made by the participating

states in accordance with their separate plans for medical assistance. The federal government then pays to the states a percentage of the amount expended, by category of expenditure. 42 U.S.C. (and Supp. V) 1396b.[11]

Under this statutory scheme, a state's duty to reimburse the cost of a specific medical procedure arises from its plan for medical assistance and is not affected by a partial withdrawal of federal funding. Accordingly, if a state's plan requires it to reimburse the cost of elective abortions, the state must continue to provide such reimbursement unless and until the plan is amended to delete coverage for elective abortions, without regard to whether federal funds will be made available to cover a portion of the cost.

The questions whether either the Constitution or Title XIX of the Social Security Act requires the states to reimburse the cost of nontherapeutic abortions are now before this Court in *Beal* v. *Doe*, No.

[11] As the system works in practice, an individual eligible for medicaid assistance receives treatment from providers of medical services who have agreed to accept a sum fixed by the state as full payment for the services rendered. The provider then bills the state. If the treatment is reimbursable under the state plan, the state pays the claims and reports the payment to the Secretary. Every three months, the Secretary makes advance payments to the states in amounts estimated to be sufficient to cover the "Federal medicaid assistance percentage" (42 U.S.C. 1396b) of each state's medical assistance payments for the forthcoming quarter. Appropriate quarterly adjustments are made for under- or over-payments. 45 C.F.R. 201.5.

75-554, and *Maher* v. *Roe*, No. 75-1440, both argued January 11, 1977. If this Court holds that the states must provide such reimbursement, *a fortiori* the states would not be permitted to amend their plans to delete coverage of elective abortions. In that event, state reimbursement of the cost of abortions would remain available notwithstanding enactment of Section 209. In that instance, the effect of Section 209 would be to reduce federal support to the states without any concomitant reduction in state assistance to medicaid beneficiaries. In those circumstances, the plaintiffs would not be affected, even indirectly, by enforcement of Section 209.[12]

If, to the contrary, this Court holds in *Beal* and *Maher* that the states need not reimburse the cost of nontherapeutic abortions, the states would then be free to amend their plans to delete coverage of such abortions (or to enforce existing provisions denying such coverage).[13] In those circumstances, a state's right to terminate coverage at least of nontherapeutic abortions would be exercisable without regard to

[12] In other cases involving the constitutionality of Section 209, district courts have denied injunctive relief on the ground that the plaintiffs there failed to demonstrate injury in view of the states' continuing obligations under Title XIX. See *Doe* v. *Mathews*, D. N.J., Civ. No. 76-1912, decided October 1, 1976; *Doe* v. *Mathews*, D. D.C., Civ. No. 76-1835, decided October 21, 1976.

[13] New York's medicaid plan denies coverage of nontherapeutic abortions, but the State is presently under court order to continue to reimburse the cost of such abortions. See *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (E.D. N.Y.), vacated and remanded, 412 U.S. 924, decision on remand, 409 F. Supp. 731, appeal pending, No. 75-1749.

whether the federal government had undertaken to defray a part of the cost of such abortions.

Of course, a state's decision whether to cover abortions might be influenced by the federal government's choice not to assist such coverage. The impact of Section 209 may be to discourage some states that otherwise would reimburse the cost of abortions from doing so. But that is the only way in which individual medicaid recipients or their providers could be affected, even indirectly, by enforcement of Section 209. Moreover, since the State of New York chose to deny coverage of nontherapeutic abortions long before enactment of Section 209 (see note 11, *supra*), the plaintiffs' interest in the outcome of this lawsuit is reducible to little more than a desire to remove Section 209 as an impediment to a possible future decision by New York to reverse its medicaid policy with respect to abortions.

This interest is far too insubstantial to confer standing upon the plaintiffs to seek judicial resolution of their claim that Section 209 is unconstitutional. "[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether * * * the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38. See also *Warth* v. *Seldin*, 422 U.S. 490; *O'Shea* v. *Littleton*, 414 U.S. 488. The plaintiffs here have shown no such injury.

At most, their claim is only that enforcement of the challenged statute may lead some third person,

in this case the State of New York, to exercise a right in a manner contrary to their economic interests. Such an allegation is not sufficient to establish standing. *Planned Parenthood of Missouri* v. *Danforth*, No. 74-1151, decided July 1, 1976 (slip op. 8, n. 2) (holding that physicians who perform abortions lack standing to challenge a statute that denies parental rights to women whose children survive an attempted abortion, even though the statute could discourage some women from seeking abortions). Cf. *Rizzo* v. *Goode*, 423 U.S. 362; *Linda R. S.* v. *Richard D.*, 410 U.S. 614. In short, this case is governed by the general rule that a plaintiff lacks standing to challenge a statute that does not apply, and has not been applied, to him. See, *e.g.*, *California Bankers Association* v. *Schultz*, 416 U.S. 21, 67-70. Cf. *New York Civil Service Commission* v. *Snead*, 425 U.S. 457.[14]

2. The district court did not clearly explain the legal basis for its conclusion that Section 209 is unconstitutional.[15] Broadly stated, the plaintiffs appear

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[14] This case does not involve plaintiffs' standing as taxpayers. Plaintiffs challenge not an expenditure but rather a nonexpenditure of funds. There is thus no logical nexus between any status the plaintiffs may claim to have as taxpayers and the statute they challenge. Cf. *United States* v. *Richardson*, 418 U.S. 166; *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

[15] The linchpin of the district court's analysis was the self-evidently erroneous proposition that the legislature lacks constitutional power to resolve controversial issues in favor of either of two contending sides. Observing that "fundamental philosophical beliefs are in direct conflict" (App. A,

to rely both upon considerations of due process, including constitutional notions of privacy, and upon an asserted denial of equal protection. Neither line of argument supports their claim that Section 209 is unconstitutional.

a. The plaintiffs' due process argument rests upon this Court's decisions in *Roe* v. *Wade*, 410 U.S. 113, and *Doe* v. *Bolton*, 410 U.S. 179. In those cases, the Court found a qualified constitutional right of privacy in "a woman's decision whether or not to terminate her pregnancy" (*Roe* v. *Wade*, *supra*, 410 U.S. at 153) and held that the imposition of criminal sanctions upon the exercise of that right in favor of abortion could be constitutionally justified only by compelling governmental interests. See also *Planned Parenthood of Missouri* v. *Danforth*, *supra*. But the logic of those decisions stops far short of requiring the federal government to provide financial support for abortions.

Section 209 does no more than deny federal funding for abortions. It does not place any prohibition,

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infra, p. 20a) over the issue of abortion, the court announced (App. A, *infra*, p. 21a; emphasis added):

> Divisions between sober and God-fearing people so deep and equal deny to civil authority any power to intervene by direction or indirection, either to compel abortion as a measure of population control or to deny medical assistance to the needy who act on their own beliefs. *When the power of enactment is used to compel submission to a rule of private conduct not expressive of norms of conduct shared by the society as a whole without substantial division it fails as law and inures as oppression.*

or impose any sanction, upon the performance of abortions. The physician remains free to perform abortions without federal restriction of any kind; the woman's right of privacy remains legally unimpaired.

Presumably the plaintiffs will argue that the withdrawal of governmental financial assistance effectively impairs the right of indigent women to receive abortions. But that argument proceeds upon a mischaracterization of the relevant legal right. There is no right to receive an abortion. The privacy right vindicated in *Roe* v. *Wade* and *Doe* v. *Bolton* is not the right affirmatively to obtain an abortion but rather the lesser right to be free to seek abortion services without governmental obstruction or interference. Thus the plaintiffs' argument is not that Section 209 actually impairs their privacy rights but only that the federal government has refused to enhance the value of those rights by paying for their exercise. The government, however, has no constitutional obligation financially to facilitate the exercise of privacy rights.[16] Its constitutional duty is merely to refrain from violating such rights, and there has been no violation here.

b. The plaintiffs' equal protection argument asserts an invidious discrimination between those medicaid beneficiaries who choose to have an abortion

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[16] For example, although there is a constitutionally protected interest in interstate travel (*Shapiro* v. *Thompson*, 394 U.S. 618), the federal government has no constitutional obligation to defray the travel expenses of indigents.

and those who instead choose to carry their pregnancies to term, on the ground that only the medical treatment furnished to the latter group is federally assisted.[17] But in eliminating federal funding for elective abortions, Congress was motivated by two legitimate concerns: to protect the potentiality of human life, and to avoid spending federal funds to support an activity many taxpayers feel to be morally repugnant. These concerns constitutionally justify the distinction drawn by Congress between abortion and childbirth.

There can be no question but that an interest in protecting potential human life underlay enactment of Section 209: the sponsor of the legislation, Representative Hyde, explicitly stated, "we * * * seek to protect that most defenseless and innocent of human lives, the unborn * * *." 122 Cong. Rec. H 6647 (daily ed., June 24, 1976). Congress was entitled to act on the basis of that interest in allocating welfare funds among potential beneficiaries. This Court has recognized that "the State does have an important and legitimate interest * * * in protecting the potentiality of human life." *Roe* v. *Wade*, *supra*, 410 U.S. at 162. Although this Court in *Roe* v. *Wade*

[17] There is no discrimination here against indigents as a class. Although the effect of provisions like Section 209 may be to encourage the states to withhold funding for elective abortions (see p. 11, *supra*), and thereby to deny governmental assistance to indigent women seeking abortions, the government has no constitutional obligation to relieve all the burdens of poverty. See *Dandridge* v. *Williams*, 397 U.S. 471, 485.

indicated that this interest may not be "compelling" with respect to a fetus not yet viable, nevertheless the interest is sufficiently substantial to afford a reasonable basis for legislative action affecting the previability stages of fetal development.[18] In the circumstances of this case, equal protection is satisfied by the existence of a reasonable basis for the statutory classification. See *Legion* v. *Richardson*, 304 F. Supp. 456 (S.D. N.Y.), affirmed *sub nom. Legion* v. *Weinberger*, 414 U.S. 1058; *Kantrowitz v. Weinberger*, 388 F. Supp. 1127 (D. D.C.), affirmed, 530 F.2d 1034 (C.A. D.C.), certiorari denied, October 4, 1976, *sub nom. Kantrowitz* v. *Mathews* (No. 75-1522). See generally *Dandridge* v. *Williams*, 397 U.S. 471, 486-487; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33; *Geduldig* v. *Aiello*, 417 U.S. 484, 495; *Weinberger* v. *Salfi*, 422 U.S. 749, 768-769.

Moreover, Congress was unwilling to continue federal funding for "a * * * procedure that appalls the conscience of a very substantial percentage of the American taxpayers." 122 Cong. Rec. S 14565

[18] "Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L. J. 920, 925 n. 41 (1973) (emphasis in original).

(daily ed., August 25, 1976) (Senator Buckley).[19] Widely held concepts of morality afford a constitutionally permissible basis for statutory classifications.[20] Considerations of morality have special force, moreover, where, as here, the legislature acts not to prohibit private activity but rather only to allocate social welfare monies contributed by the very taxpayers whose moral views are being respected. Congress may properly take account of such considerations in order to maintain public confidence in, and public support for, federal social welfare programs.[20] It therefore is permissible for Congress to choose not to require federal taxpayers to pay for abortion, which many of them regard as anathema, even if it also chooses to make federal funding available to cover the costs of child delivery.

c. The question whether the states have a constitutional obligation to reimburse the cost of nontherapeutic abortions for indigents is now before this Court in *Maher* v. *Roe*, *supra*. The decision in that

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[19] Senator Helms further observed:

> We must * * * consider today whether we will force millions of Americans to violate their long tradition of religious morality concerning abortion and force them to finance an act which they believe to be homicide. [122 Cong. Rec. S 14563 (daily ed., August 25, 1976).]

[20] Moral considerations historically have played an important and legitimate role in legislative decision-making. For example, such considerations underlie most legislative proscriptions against "victimless" crime, such as prostitution and gambling.

case necessarily will affect, and may control, determination of the constitutional issue presented here. Unless constitutional significance resides in any difference between nontherapeutic and elective abortions (see notes 2 and 5, *supra*), if the Court in *Maher* holds that the states need not reimburse the cost of nontherapeutic abortions, it would appear to follow *a fortiori* that the United States need not provide funding for elective abortions. Thus if the Court holds for the state appellant and reverses in *Maher*, the order granting a preliminary injunction in this case also should be reversed.

On the other hand, if the Court holds that the states are constitutionally required to reimburse the cost of nontherapeutic abortions, it does not necessarily follow that the United States would have a similar obligation to the states. Compare *Legion* v. *Richardson*, *supra*, and *Kantrowitz* v. *Weinberger*, *supra*, with *O'Connor* v. *Donaldson*, 422 U.S. 563. Accordingly, if this Court affirms in *Maher*, the Court should grant plenary review of both the threshold question of standing and the constitutional issue presented in this case.

CONCLUSION

This case should be held pending disposition of *Maher* v. *Roe*, *supra*. If the Court rejects the constitutional challenge in that case, the order of the district court granting preliminary relief in this case should be reversed. Otherwise, probable jurisdiction should be noted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
ELOISE E. DAVIES,
Attorneys.

FEBRUARY 1977.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76-C-1804

CORA MCRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated, PLAINTIFFS,

—against—

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT.

76-C-1805

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PLAINTIFF,

—against—

F. DAVID MATHEWS, Secretary, Department of Health, Education and Welfare, DEFENDANT.

MEMORANDUM AND ORDER

DOOLING, D.J.

By these actions plaintiffs seek to invalidate Section 209 of Public Law 94-439, the Departments of

Labor, Health Education and Welfare Appropriations Act, 1977; that section became law on September 30, 1976. It provides that:

> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term.

The Act is the general appropriation Act for the fiscal year ending September 30, 1977, and it includes provision for Medicaid reimbursement.

The part of the Conference Report on the bill dealing with Section 209 is quoted as saying (*inter alia*)

> It is not our intent to preclude payments for abortions when the life of the woman is clearly endangered . . . if the pregnancy were carried to term. Nor is it the intent of the conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or the treatment of rape or incest victims . . .
>
> * * * *
>
> The Congress is aware that there are three cases related to this issue to be heard by the Supreme Court this fall, and wishes to make clear that the Congress in its action on this particular appropriations bill does not intend to prejudge any constitutional questions involved in those cases.

It has been decided in this state that Medicaid reimbursement may not constitutionally be denied for "elective abortions" (*Klein* v. *Nassau County Medical Center*, E.D.N.Y. 1972, 1976, 347 F. Supp. 496,

409 F. Supp. 731), and it has been decided in this circuit that a state cannot constitutionally deny medical assistance to indigent women seeking "elective abortions" in the first trimester of pregnancy (*Roe* v. *Norton*, D. Conn. 1975, 408 F. Supp. 660). Both decisions arose specifically in the Medicaid context under state plans adopted under 42 U.S.C. 1396a. Both are on appeal in the Supreme Court.

The parties agree that there is no material controversy about the facts. Plaintiffs show the following facts:

Plaintiff Cora McRae is a citizen and resident of New York in the first trimester of pregnancy and in consultation with a physician has decided to terminate her pregnancy. She is without means and relies on Medicaid for all medical care. Plaintiff Planned Parenthood is a non-profit New York corporation which provides family planning services and also, at state-licensed clinics, provides about 300 first trimester abortions each month for patients eligible for Medicaid. In the first six months of 1976 it provided 6,253 abortions of which 1,777 were for Medicaid patients for which billings were about $260,000. In 1975 it provided 2,202 abortions for Medicaid patients and received $288,636 in Medicaid reimbursement. Plaintiff Irwin B. Teran is a licensed physician who specializes in obstetrics and gynecology. About half of the patients he treats at his Bushwick office are Medicaid eligible and about one-

quarter of the income of that office is derived from Medicaid reimbursements for first and second trimester abortions; he performs about three Medicaid abortions a week. (The Medicaid reimbursement to Dr. Teran is $100 for each abortion, a sum much below the usual fee for such an operation.)

The individual plaintiffs and Planned Parenthood are each representative of many others similarly situated and who are similarly affected by the prohibition of the new enactment.

The New York Health and Hospitals Corporation is a public benefit corporation charged with the responsibility for providing comprehensive health and medical services for the people of New York City and with operating sixteen municipal hospitals, twelve of which perform abortions. The most recent statistics compiled show that in 1974 the municipal hospital system provided 10,324 abortions for Medicaid eligible persons. The Hospitals Corporation anticipates, reasonably, that if federal funding is denied, private physicians, voluntary hospitals and clinics will cease providing abortion service for those generally eligible for Medicaid because of apprehension that the withdrawal of federal funding will result in their not being reimbursed. The consequence will be a great increase in the demand on the municipal hospitals for abortion services. Denial of federal funding will in turn diminish the municipal hospitals' capacity to render adequate medical care to their patients and in particular to indigent women lawfully seeking to terminate pregnancies. The municipal hospitals are not free under the law as they understand it to deny such abortion.

The municipal hospitals provide over half of all the ambulatory-patient care and emergency room visits provided in New York City and provide about 40 percent of all inpatient care furnished in the City. They provide annually three million days of inpatient care and nine million ambulatory-patient and emergency room visits. The municipal hospitals have provided elective abortions since July 1, 1970, following the enactment in its present form of Penal Law § 125.05. In the period before the *Wade* and *Bolton* decisions, from July 1, 1970 to January 1, 1973, the municipal hospitals performed 68,024 abortions for New York City residents; of these 33,914 were for patients who were eligible for Medicaid. In the same period the voluntary and proprietary hospitals and the clinics performed 112,672 abortions for city resiments, of whom about 32,169 were Medicaid eligibles. In the two years following the Supreme Court decisions, the municipal hospitals performed 42,005 abortions for city residents, of whom half were Medicaid eligible; in the same period the voluntary and proprietary hospitals and the clinics performed 169,799 abortions for city residents, of whom 35 percent were Medicaid eligible.

New York City Department of Health Statistics record 830,780 abortions performed in the six years 1970-1975 of which 405,742 were performed for residents. (The number performed for nonresidents is still substantial but only a fraction of what it was

in 1971 and 1972.) In the years 1970-1974 abortions performed in New York City for its residents were for the most part performed in the first trimester. In 1972-1974 over 83 percent were performed in the first trimester; in 1971 the percentage was 79 percent. In the same years over half the abortions were performed for non-whites and Puerto Ricans. Incomplete 1975 statistics record 81,426 abortions for residents of the city, 16,478 being performed in municipal facilities about half of which were performed for Medicaid eligibles, representing Medicaid reimbursement of $2,306,920.

The New York Department of Social Services through its Commissioner has taken the position throughout the litigation in *Klein* v. *Nassau County Medical Center*, *supra*, that the State Medicaid plan does not provide reimbursement for any abortions except those which are "medically necessary." The Commissioner has appealed the decision in the *Klein* case requiring reimbursement to providers who perform abortions during the first twenty-four weeks from the commencement of pregnancy regardless of whether such abortions are medically necessary or not. The Commissioner's Administrative Letter 76 ADM-92 of September 3, 1976, directed local Social Service Commissioners to allow claims for legal abortions performed for Medicaid eligibles by qualified providers, and that

> . . . usual billing procedures shall be followed, and any bill for an abortion should be handled as a bill for a surgical procedure.
>
> * * * *
>
> It should again be noted that abortions are not considered family planning procedures and therefore may not be claimed at the 90% Federal and 5% State reimbursement levels. They should be claimed at the usual reimbursement level of 50% Federal and 25% State share.

Title XIX of the Social Security Act was enacted in July 1965 for the purpose of "enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependent children," and it authorized the annual appropriation for each fiscal year of a sum "sufficient to carry out the purposes" of Title XIX; sums made available under the authorization "shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education and Welfare State plans for medical assistance." 42 U.S.C. 1396. Title XIX requires state plans to include a number of very specific provisions as a condition to approval by the Secretary (42 U.S.C. § 1396a(a)(b)), and requires State financial participation equal, in New York's case, to 50 percent, matching the "Federal Medical Assistance percentage" of 50 percent—the statutory minimum for the federal participation. 42 U.S.C. §§ 1396a(a)(2), 1396d(b).

Section 1396h makes it a federal misdemeanor to make a false statement in an application for a payment under a State plan approved under Title XIX or to make or cause to be made a false statement of a material fact for use in determining rights to a payment under an approved State plan. It is also made a misdemeanor to solicit, offer or receive a kickback or bribe or a rebate of fee in connection with furnishing a service "to any individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under" Title XIX.

New York in 1966 adopted Title II of the New York Social Services Law (Sections 363-369) to provide medical assistance to needy persons in pursuit of the state's goal of making available to everyone, regardless of race, age, national origin or economic standing, uniform, high-quality medical care (Section 363). Title 11 was drafted in conformity with Title XIX of the federal act and Section 363-a required submission of the state plan to the Department of Health, Education and Welfare for approval. It was approved.

The Secretary contends first, that plaintiffs will suffer no harm from the enactment because the state under its law and, perhaps, under federal constitutional imperatives must continue to reimburse providers who perform lawful elective abortions. Cases, of which *Klein* v. *Nassau County Medical Center*, *supra*, and *Roe* v. *Norton*, *supra*, are typical, the argument continues, have required the states to grant

such reimbursement under state law and regulations that conform to the requirements of Title XIX of the Social Security Act, and the state has complied. That the state may not obtain reimbursement does not, the Secretary asserts, discharge the state's responsibility under the State constitution (Article XVII, Section 1) to provide for the aid, care and support of the needy, a responsibility legislatively imposed on the public welfare districts which must discharge that responsibility even if the state is not required to reimburse them. *Jones* v. *Berman*, 1975, 37 N.Y. 20-42, 54-55.

The argument overlooks the essential nature of the Medicaid legislation. The state and federal government are linked in a fiscal partnership to provide for medical assistance to the needy; the program is based on the federal initiative, and the funding is primarily federal (42 U.S.C. § 1396, 1396d (b)). The needy are citizens no less of the United States than of the states of their residence, and in the federal society of today the federal government is not a grantor of voluntary bonifications to the states, but a representative government discharging through state agencies its responsibilities to provide from the public revenues (the sources of which it has so largely preempted) for its own needy in the states of their residence, and with the administrative and fiscal assistance of the states. Counsel misread *Burns* v. *Alcala*, 1975, 420 U.S. 469; it says only that state plans are not required to provide assistance for the

unborn children of the needy. The Court did not invalidate the regulation providing for the reimbursement of states which, like New York (*cf. Rankin* v. *Lavine*, 4th Dept. 1975, 50 App.Div.2d 1091, 376 N.Y.S.2d 355) elect to pay benefits in respect of unborn children. But these are cases dealing with statutory interpretation, not with constitutional principle nor with the measure of responsibility directly to the needy which the national government assumed when, in Title XIX of the Social Security Act, it laid down the parameters of medical assistance for the needy of the nation. The states are not the beneficiaries of Title XIX but the agencies through which the national government secures medical assistance to the needy.

It follows that withdrawal of reimbursement for elective abortions lawfully performed by licensed providers is directly injurious both to the providers and to the indigent women who seek the abortional services. The providers are denied payment, by the hand of the state, of what the government is (assuming their basic contention is constitutionally correct) obligated to pay them from the appropriation for carrying out Title XIX of the Social Security Act. The indigent women, the recipients of the medical assistance which it is the purpose of Title XIX to provide, have the interest of primary beneficiaries in the making of the payments, if their constitutional contention is correct.

The plaintiffs Planned Parenthood and Teran say that they will not, and the Hospitals Corporation

shows that it will not long be able to, provide abortional service in the elective cases if the new enactment is valid and no federal funds are made available. It may well be that the state could find funds to assume the responsibility for making the payments, or that private charity could supply the abortional services. But that is no more than to say that if the national government unconstitutionally denies an entitlement, catastrophe need not ensue. The answer is that action if unconstitutional, is not tolerable, and is not made tolerable by the consideration that others may make good the harms inflicted by the unconstitutional default. The manifest fact is that Section 209 is calculated to stop the provision of abortional services from public funds; it is not calculated to shift the burden of providing this medical assistance to the states. *Cf. Shapiro* v. *Thompson*, 1968, 394 U.S. 618.

That the plaintiff providers have "standing" to sue is plain then, from *Planned Parenthood of Missouri* v. *Danforth*, 1976, 96 Sup.Ct. 2831, and *Singleton* v. *Wulff*, 1976, 96 Sup.Ct. 2868. The interest of the needy women is self-evident. And *cf. Aguayo* v. *Richardson*, 2d Cir. 1973, 473 F.2d 1090, 1098-1101.

It is argued that the judicary has not the power of appropriation and that to declare Section 209 invalid and order that reimbursement for elective abortions continue would amount to exercising the power of appropriation in violation of Article I, Section 9, Clause 7, which provides that "No money shall be

drawn from the Treasury, but in Consequence of Appropriations made by Law. . ."

Public Law 94-439 is an appropriation Act. Its enacting clause and relevant text read:

> *Be it enacted* . . ., That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Labor and Health, Education and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes, namely:
>
> * * * *
>
> SOCIAL AND REHABILITATION SERVICE
> PUBLIC ASSISTANCE
>
> For carrying out, except as otherwise provided, titles I, IV, X, XI, XIV, XVI, XIX, and XX of the Social Security Act, and the Act of July 5, 1960 (24 U.S.C., ch. 9) $18,040,850,000, of which $56,500,000 shall be for child welfare services under part B of title IV.
>
> For making, after June 30 of the current fiscal year, payments to States under titles I, IV, X, XIV, XVI, XIX and XX, respectively, of the Social Security Act, for the last three months of the current fiscal years (except with respect to activities included in the appropriation for "Work incentives"); and for making after July 31 of the current fiscal year, payments for the first quarter of the succeeding fiscal year; such sums as may be necessary, the obligations incurred and the expenditures made thereunder for payments under each of such titles to be

> charged to the subsequent appropriations therefor for the current or succeeding fiscal year.
>
> In the administration of titles I, IV (other than part C thereof), X, XIV, XVI, XIX, and XX. respectively, of the Social Security Act, payments to a State under any such titles for any quarter in the period beginning July 1, 1976, and ending September 30, 1977 may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.
>
> Such amounts as may be necessary from this appropriation shall be available for grants to States for any period in fiscal year 1976 and the period July 1, 1976 through September 30, 1976 subsequent to March 31, 1976.
>
> * * * *
>
> Sec. 206. No part of the funds contained in this title may be used to force any school or school district which is desegregated as that term is defined in title IV of the Civil Rights Act of 1964, Public Law 88-352, to take any action to force the busing of students; to force on account of race, creed, or color the abolishment of any school so desegregated; or to force the transfer or assignment of any student attending any elementary or secondary school so desegregated to or from a particular school over the protest of his or her parents or parent.
>
> Sec. 207. (a) No part of the funds contained in this title shall be used to force any school or

school district which is desegregated as that term is defined in title IV of the Civil Rights Act of 1964, Public Law 88-352, to take any action to force the busing of students; to require the abolishment of any school so desegregated; or to force on account of race, creed, or color the transfer of students to or from a particular school so desegregated as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school.

(b) No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.

Sec. 208. None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with title VI of the Civil Rights Act of 1964.

Sec. 209. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

Senators Buckley and Helms and Representative Hyde seek to intervene in support of the legislation

in their interest as Members of Congress seeking to protect their votes in favor of the legislation from judicial nullification, and in their interest as citizen-taxpayers.

A legislator has a recognized right to sue to secure legal recognition of the effectiveness as an enactment of a bill for which he voted but which has—with arguable impropriety—been denied promulgation as a law (*Kennedy* v. *Sampson*, D.C. Cir. 1974, 511 F. 2d 430), or to annul a concurrent resolution on the ground that it had not in fact been adopted because one indispensably necessary vote was unauthorized in law (*Coleman* v. *Miller*, 1939, 307 U.S. 433). In such cases the right to sue derives from the legal injury done to the legislator's vote as integral to the process of enactment; the litigation is addressed to establishing the efficacy of the legislator's vote as a vote to be counted in the legislative process. But that clear right—in effect, to have his vote counted at its full legal value—is not involved here. No one has challenged the correctness of the process of enactment. The challenge is to the constitutional validity of one section of a correctly enacted law. To grant intervention on the ground of the members' participation in enacting the law would involve accepting as a principle that each member of the Congress has an interest to intervene in every case in which the substantive constitutionality of a provision in a federal enactment was drawn into question, or, indeed, in which the interpretation of a federal statute

was in question. *Cf.*, *Holtzman* v. *Schlesinger*, 2d Cir. 1973, 484 F.2d 1307, 1315.

Flast v. *Cohen*, 1968, 392 U.S. 83, 102-103, although it dealt with an income-taxpayer's interest in preventing expenditure of public funds, would indicate the existence of a taxpayer interest in the present case, an interest to prevent a specific type of expenditure in contravention of a very specific statute. The Congress, it seems, had before it evidence, furnished by the Department of Health, Education and Welfare, that the Medicaid expenditure occasioned by full term births was several fold the expenditure for lawful abortion. But the taxpayer interest is rather in the legality of the expenditure than in private tax savings. The test is the immediacy and specificity of the citizen-taxpayer's concern with the substantive principles involved in the challenged species to public expenditure. *Flast* v. *Cohen* can hardly be said to have been extended, but it has not been overruled, and it is concluded that the senators and the representative have brought themselves within it in their roles as citizen-taxpayers. It should be said that, were intervention not permissible, the assistance of the intervenors' papers as submission of *amici curiae* would have been equally welcome.

The contention that an order requiring continued payment for lawful abortions would be an illicit attempt to appropriate funds from the Treasury cannot be sustained. The language of the Act makes clear that Congress has appropriated what it judges sufficient money for carrying out Title XIX and that

it has sought only to restrict the circumstances in which the funds can be used to pay providers of lawful abortional services. If that prohibition of use transgresses constitutional rights, it cannot be given effect. Payment of funds will follow, but not by an act equivalent to appropriation. *United States* v. *Lovett*, 1946, 328 U.S. 303, dealt with a section of an appropriation act which, similarly, forbade the use of any part of the money appropriated by the Act for a specific purpose—in that case, the payment of salaries to three federal employees who had been accused of being "subversives." The Court held that the prohibitory section did not bar the payments of the employees' salaries because the section was unconstitutional as, in substance, a bill of attainder. Counsel for the Congress argued unsuccessfully the exclusive and complete control of the Congress over the disbursing process and that the issues raised by the section were not justiciable. So here, the section is a constraint on the use of appropriated funds, and, if the constraint here is one that cannot be lawfully imposed for constitutional reasons, as it was in *Lovett*, then there is here no bar to the payment of the money for abortional services.

It is argued that it is improbable that the challenge to the validity of the Section 209 will succeed. It is contended that Section 209 fits a consistent pattern of affirmatively encouraging, and of requiring state plans to offer, family planning services and of excluding abortion from the array of licit family planning methods. And it is argued that *Legion* v.

Richardson, S.D.N.Y. 1973, 354 F. Supp. 456, 414 U.S. 1058, holding valid so much of Title XIX as excludes federal grants for the long-term care of inpatients aged 21 to 65 in mental hospitals, signifies that exclusions from Medicaid coverage are not necessarily invalid. But the clear concern for making family planning available is not related to the issues raised by Section 209. That section is, ultimately, concerned with the denial of medical assistance to the needy. It is not validated by putting it in juxtaposition with the federal encouragement of family planning, for it would appear, put in that relation, as punitive, as a retributive act, not a simple, non-invidious decision not to provide a type of medical assistance. The section is aimed at conduct and is not oriented to need. *Legion*, in contrast, was found by the Court, in substance, to be a reasoned legislative decision not to extend Medicaid into the field of long-term inpatient treatment of the insane aged 21 to 65, and to be free of invidious discrimination in the making of that choice. The appeal there must be to the Congress and not to the courts.

The Court has made clear (*Roe* v. *Wade*, 1973, 410 U.S. 113, *Doe* v. *Bolton*, 1973, 410 U.S. 179) that the constitutionally protected personal rights of women include the right to terminate pregnancy in consultation with their physicians, and that the state's interest enters only in the second trimester, and is then extended only to taking measures to preserve and protect maternal health. *Planned Parenthood of Missouri* v. *Danforth*, *supra*, makes additionally clear

that the state cannot require that a woman's spouse consent to abortion, nor require, in the case of a woman under the age of eighteen years, that she obtain the consent of one parent to an elective abortion.

The cases in the District Courts and the Courts of Appeals which have invalidated efforts of certain of the states under their Title XIX plans to deny Medicaid reimbursement for elective abortions establish the probability that plaintiffs will prevail on the ultimate issue of merit. *Klein* v. *Nassau County Medical Center*, *supra*; *Roe* v. *Norton*, *supra*; *Wulff* v. *Singleton*, 8th Cir. 1974, 508 F.2d 1211, *rev'd in part*, *Singleton* v. *Wulff*, *supra*; *Doe* v. *Rose*, 10th Cir. 1974, 499 F.2d 1112; *Doe* v. *Westby*, D. S.D. 1975, 402 F. Supp. 140; *Doe* v. *Rampton*, D. Utah 1973, 366 F. Supp. 189; *Doe* v. *Wohlgemuth*, W.D. Pa. 1973, 376 F. Supp. 173, *aff'd*, *sub nom.*, *Doe* v. *Beal*, 3d Cir. 1975, 523 F.2d 611. (The Supreme Court will determine the issue.)

The women affected by the enactment of Section 209 are denied no other medical assistance; they are, as Medicaid eligibles, undeniably entitled to medical assistance in their pregnancies. Section 209, however, would deny them reimbursement for medical assistance only if they elect to exercise their constitutionally protected right to terminate their pregnancies. Others who have the means to pay for medical services are free by virtue of our positive law to exercise their constitutional right to terminate their pregnancies, but the needy, the wards of government,

would by this enactment be denied the means to exercise their constitutional right.

It does not alter the case to say that taxpayers ought not be called on to pay for abortional services, that their refusal, through the Congress, to do so, leaves the indigent woman free to exercise her constitutional right with the help of those who are willing to assist her. The freedom is unreal. It remains true that needed medical assistance is denied solely because the woman has chosen to exercise a constitutionally protected right. Section 209 will not in fact save public funds and so give relief to taxpayers, for as noted above, the Congress was advised that the alternative costs for medical assistance during prenatal care, at birth and after are very much greater.

It is undeniable that Section 209 expresses a strongly and widely held disapprobation of lawful abortion. The view is profoundly rational and espoused with religious fervor. It is neither purely sectarian nor identifiable with any political allegiance. But on this issue fundamental philosophical beliefs are in direct conflict. What some regard as denigration of the sanctity of human life others regard as involving no such matter, for the definition of human life is itself in debate (*cf. Byrn* v. *New York City Health and Hospitals Corp.*, 1972, 31 N.Y.2d 194, *appeal dismissed*, 1973, 410 U.S. 949), and visualize opposition to lawful abortion as both inhumane and callously indifferent to the tragic lot

of the unwanted child. Divisions between sober and God-fearing people so deep and equal deny to civil authority any power to intervene by direction or indirection, either to compel abortion as a measure of population control or to deny medical assistance to the needy who act on their own beliefs. When the power of enactment is used to compel submission to a rule of private conduct not expressive of norms of conduct shared by the society as a whole without substantial division it fails as law and inures as oppression.

The petition for the appointment of a guardian *ad litem* for unborn children raises, again, the primary contention that *Roe* v. *Wade* and the cases applying it have been wrongly decided, and that, in any event, in this new phase of the litigations the interests of the unborn should be represented. It is concluded that the contentions made for the class must be rejected. Nevertheless, the contention that the class should be represented may not be rejected; for that reason the right to intervene is granted, and the guardian's contentions have been considered.

It is argued that plaintiffs are not now harmed, may never be harmed, if the state pays for the abortions, and, therefore, are not entitled to relief by preliminary injunction. But in fact the apprehension of the providers is substantial, and the risk to the women seeking abortions is real. The harms are peculiarly irreparable in kind. The federal funding and planning is critically important. It is idle to suggest that the withdrawal of federal support and

the lead the federal government has sought to take will not result in renewed efforts by the states to deny the needed medical assistance in these cases. The two Central Services Unit, State of New Mexico, Memoranda (CSU-76-13, CSU MEMO 76-14) (attached to affidavit of Lewis Koplik sworn to October 15, 1976) illustrate the effect: on the enactment, the Unit announced that it would reimburse only for therapeutically necessary abortions; after restraining orders were entered, the Unit cancelled the first announcement and resumed reimbursement. The affidavit of Alfred F. Moran, sworn to October 15, 1976, shows that the office of the New York Commissioner of Social Services is not prepared to commit the Department to continued reimbursement if the federal payments are terminated. The affidavit of David Goldberg, sworn to October 15, 1976, is to the same effect. Without a continuance of the federal payments, it is clear that irreparable harm will be done to the indigent women involved. To continue the payments is to preserve the *status quo* until the rights involved are authoritatively determined.

This is not a case in which security is required. It is not unusual to require it in the case of poor persons, and it would be inappropriate to require it of the Hospitals Corporation. Planned Parenthood and Mr. Teran are in a different situation, but in this case no monetary harm is threatened. Rather the lawful abortional acts will operate to diminish Title XIX payments.

It is, accordingly,

ORDERED that

1. Plaintiff Cora McRae is entitled to maintain this action as a class action pursuant to Rule 23(a), (b)(1) and (2), on behalf of the class of pregnant or potentially pregnant Medicaid-eligible women in the State of New York, who, in consultation with their physicians, decide within twenty-four weeks after the commencement of pregnancy, to terminate their pregnancies by abortion;

2. Plaintiff Dr. Irwin Teran is entitled to maintain this action as a class action pursuant to Rule 23(a), (b)(1) and (2), on behalf of the class of duly licensed and Medicaid-certified providers of abortional services to Medicaid-eligible pregnant women;

3. The defendant, his successors in office, agents, servants, employees, attorneys, and those other persons in active concert and participation with him who receive actual notice of this order by personal service or otherwise

A. Cease to give effect, in any way to Section 209 of Public Law 94-439, and cease from discriminating, in the provision of Medicaid payments, against women who choose or who have chosen abortion and in favor of women who choose or have chosen to carry their pregnancies to term; and

B. Continue to authorize and expend federal matching funds for abortions provided to women

eligible for Medicaid at the proportionate level and in accordance with the standards under which they were being paid before enactment of Section 209 of Public Law 94-439, and treat requests for medicaid reimbursement for abortions performed for Medicaid-eligible women by duly certified providers on the same basis as they would requests for reimbursement for medical services and hospital care occasioned by carrying a pregnancy to term;

C. Forthwith communicate the following notice to the Regional Directors of the Department of Health, Education and Welfare with instructions that they promptly disseminate this notice to all State Medicaid authorities within their region, with instructions to the State agencies that they in turn communicate this notice to all local Medicaid authorities, and providers (hospitals, doctors and clinics) of pregnancy-related care to Medicaid-eligible women. The notice shall read as follows:

In conformity with the order of the United States District Court for the Eastern District of New York, entered October 22, 1976, which enjoins enforcement of the Hyde Amendment, the Department of Health, Education and Welfare will provide reimbursement for all abortions provided to Medicaid-eligible women by certified Medicaid providers on the same basis

as the Department pays reimbursement for pregnancy and childbirth-related services.

Brooklyn, New York
October 22, 1976

/s/ John F. Dooling, Jr.
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 C 1804

CORA MCRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated, PLAINTIFFS,

—against—

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT.

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76 C 1805

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PLAINTIFF,

—against—

F. DAVID MATHEWS, Secretary, Department of Health, Education and Welfare, DEFENDANT.

DOOLING, D.J.

The Secretary has moved to amend the order of October 22, 1976, to provide that Medicaid reimbursement paid under the Order will be subject to recoupment if the Order is reversed on appeal.

During the hearing plaintiffs expressed apprehension that a preliminary injunction would accomplish nothing if it was implicit in it that, if the Secretary ultimately prevailed on the merits, all payments made while the injunction was in force would have to be returned by the providers of the medical services to the Government, directly or through the State. Plaintiffs indicated that in such case no abortional services could be expected to be performed *pendente lite*. Because the issue so raised then appeared both to involve a request that the court purport to determine the legal consequences of its own order, and also to deal with conjectural future circumstances, the issue was not passed on. The Secretary now argues that because the injunction is immediately effective and, in consequence, requires payments now to be made that may ultimately be determined to be payments forbidden by valid law, the order should now be modified to provide that payments made in obedience to the order should be recoverable by the Secretary if perfect justice is to be done.

There would be much force to the Secretary's argument if this were a case between private litigants over property interests. It is not. For some three years and more the Secretary has, under Title XIX of the Social Security Act, granted reimbursement of Medicaid payments for lawful abortional services. The legislative history indicates that the Department of Health, Education and Welfare neither requested nor supported the enactment of Section 209 of Public

Law 94-439. There was evidence from the Department before the Congress that no economy would be effected by the enactment of Section 209, but that on the contrary, Medicaid expenditures would tend to be increased. Section 209 was, nonetheless enacted, and, although it sought to reverse policy on a controversial issue known, to say the least, to raise grave constitutional questions, Section 209 was made effective immediately. The enactment is not a money-saving enactment. Compliance with an injunction against action under it will not do monetary damage to the Secretary in his official capacity.

The argument then, is simply that the payments will, if the Secretary ultimately prevails, be shown to have been without warrant in law, and, therefore, should, like impounded payments under a challenged rate increase, be refunded at the end of the litigation. But the payments will not have been illegal. They will be payments lawfully made under court order for lawful services actually rendered. So long as the order is unreversed, there is no wrongdoing that could give rise retroactively to an equity of restitution. Nor is the reason far to seek. Section 209 is not concerned with money, but with private conduct. That indigent women may, *pendente lite*, be enabled to exercise a constitutional right is not a wrong nor does it waste federal funds.

To grant the relief now sought might well, as plaintiffs contend, be tantamount to denying the preliminary injunction. But the injunction was granted on a finding of probable ultimate success in the liti-

gation. Granting the injunction, because of the constitutional probability and the irreparable harms threatened by Section 209, meant granting effective relief, not making a symbolic gesture. Because it was not the final judgment, the Memorandum did not explicitly hold that Section 209 was unconstitutional. So much, however, is implicit in the granting of the injunction in the terms in which it had to be granted if it was to be efficacious.

So far as concerns the plaintiff McRae and the class she represents, the present application is equivalent to requesting security under Rule 65(c). In such cases as this the imposition of the impossible is not required. *Cf. Bass* v. *Richardson*, S.D.N.Y. 1971, 338 F.Supp. 478, 489-491.

Accordingly, it is

ORDERED that the motion to amend the Order of October 22, 1976, is denied.

Brooklyn, New York
October 29, 1976.

/s/ John F. Dooling, Jr.
U. S. D. J.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 76 C 1804

CORA MCRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated, PLAINTIFFS,

—against—

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT,

—and—

SENATORS JAMES L. BUCKLEY, JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE and ISABELLA M. PERNICONE, As Guardian for the unborn, INTERVENORS.

Civil Action No. 76 C 1805

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PLAINTIFF,

—against—

F. DAVID MATHEWS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT,

—and—

SENATORS JAMES L. BUCKLEY, JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE and ISABELLA M. PERNICONE, As Guardian for the unborn, INTERVENORS.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. NOTICE is hereby given that the defendant, Secretary of Health, Education, and Welfare, hereby appeals to the Supreme Court of the United States from the order of the Honorable John G. Dooling, Jr., granting plaintiffs' motion for a preliminary injunction, entered in this action on October 22, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1252.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record.

III. The following question is presented by this appeal:

Whether the District Court erred in enjoining § 209, Public Law 94-439, the so-called "Hyde Amendment" to the Department of Labor and Department of Health, Education and Welfare Appropriations Act of Fiscal year 1977, on constitutional grounds.

Dated: Brooklyn, New York
November 19, 1976

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By: /s/ Lewis F. Tesser
LEWIS F. TESSER
Assistant U. S. Attorney

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Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-1113

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA McRAE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM IN OPPOSITION TO THE MOTION TO AFFIRM OR DISMISS

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1113

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA McRAE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM IN OPPOSITION TO THE MOTION TO AFFIRM OR DISMISS

Pursuant to 28 U.S.C. 1252, this case is here on appeal from an order of the United States District Court for the Eastern District of New York, preliminarily enjoining enforcement of Section 209 of Pub. L. 94-439, 90 Stat. 1434. Characterizing the decision below as an "interlocutory determination of * * * probability of success on the merits" rather than as an "interlocutory determination of unconstitutionality," appellees contend (Mot. 4-11) that this Court lacks jurisdiction. Both appellees' premise and their legal argument are erroneous.

1. Appellees' premise that there has been no holding on the constitutional issue is unsound; the district court made an "interlocutory determination of unconstitutionality" (Mot. 6). In its opinion on rehearing, the district

court noted that in its initial opinion it had not explicitly stated "that Section 209 was unconstitutional" (J.S. App. B, p. 29a), but it hastened to repair that deficiency by acknowledging that a holding of unconstitutionality had been "implicit in the granting of the injunction" (*ibid.*).[1] Accordingly, appeal lies to this Court under 28 U.S.C. 1252, which permits such an appeal from "an interlocutory * * * judgment * * * holding an Act of Congress unconstitutional in any civil action * * * to which [the federal government] is a party."

2. But appeal would lie to this Court even if, as appellees contend, the decision below were based upon an "interlocutory determination of * * * probability of success on the merits" (Mot. 6). Where, as here, enforcement of an Act of Congress is sought to be enjoined exclusively on constitutional grounds, an interlocutory order enjoining enforcement is a holding of unconstitutionality within the meaning of 28 U.S.C. 1252.

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[1]Appellees rely upon the district court's "reference [in its initial opinion] to the fact that it was merely adjudicating the probability of ultimate success" (Mot. 8). But appellees overlook that the district court was referring to the likelihood that *this Court* would decide the issue favorably to the position taken by appellees. The district court stated (J.S. App. A, p. 19a; emphasis added):

> The cases in the District Courts and the Courts of Appeals which have invalidated efforts of certain of the states under their Title XIX plans to deny Medicaid reimbursement for elective abortions establish the probability that plaintiffs will prevail on the ultimate issue of merit. [Citations omitted.] (*The Supreme Court will determine the issue.*)

Thus the district court itself held Section 209 unconstitutional but is awaiting this Court's decisions in the pending state cases (*Beal* v. *Doe*, No. 75-554, and *Maher* v. *Roe*, No. 75-1440, both argued January 11, 1977) before proceeding to final judgment. This view is confirmed by the fact that no further proceedings have been conducted in the district court.

This Court so held in *McLucas* v. *DeChamplain*, 421 U.S. 21. In that case, the United States District Court for the District of Columbia had preliminarily enjoined a court martial proceeding under Article 134 of the Uniform Code of Military Justice, holding that "[p]laintiff has demonstrated the likelihood of his prevailing on the merits." 367 F. Supp. 1291, 1298. This Court accepted jurisdiction over the government's appeal pursuant to 28 U.S.C. 1252, stating (421 U.S. at 30):

> It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally "hold" the article unconstitutional. By its terms, however, §1252 applies to interlocutory as well as final judgments, decrees, and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief.

In other words, this Court, unlike appellees, drew no distinction between "an interlocutory determination of * * * probability of success on the merits" and "an interlocutory determination of unconstitutionality." Under *DeChamplain*, it is sufficient for this Court's jurisdiction that an Act of Congress has been attacked solely on constitutional grounds and the interlocutory judgment is against the validity of the Act.

This result is sound. The principal purpose of 28 U.S.C. 1252 is to permit the federal government to obtain expeditious review by this Court when a lower court has stopped, even if only preliminarily, the operation of a

federal statute. See *Fleming* v. *Rhodes*, 331 U.S. 100, 103-104; *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31. That purpose would be significantly frustrated if, as appellees argue, the question of jurisdiction were to be made to turn upon the degree to which the lower court's views on the underlying constitutional issue could be said to be fixed rather than tentative. Such a rule would engender case-by-case jurisdictional litigation, which, by injecting additional issues and creating confusion over which appellate court has jurisdiction, would substantially impair the ability of parties to obtain the expeditious appellate resolution that the statute was designed to provide.

Jurisdictional statutes are to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546. See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171. Appeal therefore should lie under 28 U.S.C. 1252 without regard to whether the lower court believed a challenged statute was certainly, or only probably, unconstitutional, so long as the court acted on that belief to enjoin the statute's operation.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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